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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Petition for Rulemaking	)
of Consumers Union and	)
Consumers Federation of America	)
for Amendment of the	)
Commission's Rules to Update	)
Cable Television Regulations	)
and Freeze Existing Cable	)
Television Rates	)

COMMENTS OF CBS INC.

CBS Inc. ("CBS") hereby respectfully submits this filing in response to the above-captioned petition for rulemaking filed by Consumers Union ("CU") and the Consumer Federation of America ("CFA"), for the limited purpose of reiterating its opposition to the expansion of the Commission's program access rules[1] to non-vertically integrated programmers. As CBS has shown in its Reply Comments[2] filed in connection with the Commission's Notice of Inquiry in its annual assessment of competition in the video programming marketplace, not only does the Commission lack statutory authority to take this step, but it has repeatedly -- and recently -- found expansion of the rules to be unsupported by

[1] 47 C.F.R. § 76.1002.

[2] Reply Comments of CBS Inc. in CS Docket No. 97-141 (filed August 20, 1997) ("Reply Comments").

HFJ/22880/1

any showing of need. Beyond assertions supported only by unelaborated references to the contentions of other parties, CU and CFA add nothing on this issue.

CBS respectfully refers the Commission to the above-referenced Reply Comments (a copy of which is attached hereto) at pages 1-7 for a more detailed discussion of why the Commission legally cannot -- and as a matter of policy should not -- consider the expansion of the program access rules called for by CU and CFA.

Respectfully submitted,

CBS Inc

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October 30, 1997

HFJ/22880/2

CERTIFICATE OF SERVICE

I, Howard F. Jaeckel, do hereby certify that I have on the 24th day of October 1997, caused to be sent by First Class United States mail, postage prepaid, a copy of the foregoing Comments of CBS Inc. to the following:

Sandra B. Eskin, Esq.
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Bethesda, Maryland 20816

Howard F. Jaeckel

HFJ/22880/3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 97-141
Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF CBS INC.

In comments filed in this proceeding, a number of parties[1] whose business interests would thereby be served call yet again for the extension of the Commission's program access rules to non-vertically integrated programmers -- an expansion of Commission regulation over the video programming marketplace for which statutory authority is lacking, and which the Commission has only recently found to be unsupported by any showing of need. CBS Inc. ("CBS"), a distributor of non-vertically integrated programming services,[2] strongly opposes

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1 See Comments of Ameritech New Media, Inc. ("Ameritech"); Bell South Corporation et al ("Bell South"); Bell Atlantic and NYNEX ("Bell Atlantic/NYNEX"); DIRECTV, Inc. ('DIRECTV"); and the Wireless Cable Association International Inc., ("Wireless Cable Association") CS Docket No. 97-141 (each filed July 23, 1997).

2 CBS Cable presently distributes a number of program services, including The Nashville Network ("TNN"), Country Music Television ("CMT"), and CBS Eye On People ("Eye On People"). The parent company of CBS Inc., Westinghouse Electric Corporation, ("Westinghouse") wholly owns Eye On People, and is in the process of acquiring TNN, and the two-thirds of CMT it does not already own, from Gaylord Entertainment Company ("Gaylord"). Presently, TNN is wholly owned by Gaylord, and CMT is owned two-thirds by
(continued...)

such an extension of the rules, which would not only be without legal basis, but would inhibit the development of program services unaffiliated with cable MSOs -- thereby reducing, rather than promoting, competition.

1. The Commission Has No Statutory Authority To Regulate Non-Vertically Integrated Cable Programming Services.

For the most part, the parties urging extension of the program access rules to non-vertically integrated program services simply ignore the fact that the Commission has no statutory authority to take this step.[3] CBS respectfully submits that the time has come for the Commission to lay to rest any remaining doubts on this score by a clear statement of the scope of its regulatory authority under Section 628 of the Communications Act.[4]

Under that Section, the Commission is directed to adopt regulations prohibiting any satellite cable programmer in which a cable operator has an "attributable interest" from unreasonably denying a multichannel video programming distributor ("MVPD") access to a

[2](...continued)
Gaylord and one third by Westinghouse.

[3] See, Comments of Ameritech at 14-18; Comments of Bell South at 16; Comments of DIRECTV at 6; Comments of Wireless Cable Association at 13. Other commentors implicitly recognize this absence of authority by urging only that the Commission recommend to Congress that the current law be amended to cover non-vertically integrated programmers. See, e.g., Comments of Bell Atlantic-NYNEX at 7.

[4] 47 U.S.C. § 548. The program access provisions were originally enacted as Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act").

program service, or from discriminating in the price and other terms by which such service is offered.[5] Nothing in the statute suggests that the Commission may extend such rules to program services which are not vertically integrated.

While the language of the statute is unambiguous, the legislative history further highlights the unmistakable intent of Congress. Thus, the Report of the Senate Commerce Committee on the Senate version of the bill which became the 1992 Act stated:

> "To encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in the price, terms, and conditions in the sale of programming. ... This provision is limited to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them."[6]

Similarly, the Conference Report noted that the regulations to be adopted by the Commission under the statute were to prohibit

> "a satellite cable programming vendor affiliated with a cable operator from discriminating in the price, terms, and the conditions in the sale or delivery of programming to cable operators, other multichannel video programming distributors, and their buying agents."[7]

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5 47 U.S.C. § 548(c). Under the 1992 Act, exclusive contracts between a cable programming vendor affiliated with a cable operator and such an operator are permitted within areas served by the operator, provided any such agreement is first found by the Commission to serve the public interest. Id. at §§ 548(c)(2)(D); 548(c)(4).

6 Senate Report 102-92, 102nd Cong., 2d Sess., 1992 U.S. Code Cong. and Adm. News at 1133, 1161 (emphasis added).

7 House Conference Report No. 102-862, 102nd Cong., 2d Sess., 1992 U.S. Code (continued...)

Moreover, while Congress amended the program access provisions only last year to include common carrier MVPDs within their scope,[8] it took no such action with respect to program services not affiliated with a cable operator. The Congress' failure to act -- in the face of repeated calls for such an expansion in the rules -- provides additional confirmation of the statute's intent.

There can accordingly be no doubt that the Commission is without authority to extend the program access rules to services which are not vertically integrated with cable operators. In any event, no policy basis exists for such regulation.

2. Because There Is No Evidence Or Basis In Policy Which Would Warrant Extension Of The Program Access Rules, The Commission Should Reject Calls For Their Expansion As It Has Repeatedly Done In The Past.

In issuing its Third Annual Report on competition in markets for the delivery of video programming last January, the Commission yet again rejected calls for the extension of the program access rules to non-vertically integrated program vendors, citing "insufficient [evidence]" warranting such a change.[9] Only seven months later, that evidence is still lacking.

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[7](...continued)
Cong. and Adm. News at 1231, 1274 (emphasis added).

[8] See, Telecommunications Act of 1996, P.L. 104-104, 110 Stat 56, § 301(h).

[9] Third Annual Report, CS Docket 96-133 (released January 2, 1997) at ¶ 157. See also Second Annual Report, CS Docket No. 95-61 (released December 11, 1995) at ¶ 168.

Program access expansionists have failed once more to show either (1) that they have been denied access to program services they desire by non-cable affiliated programmers, or (2) that they have suffered competitive injury as a result of any such denial.[10] The vague assertions they make instead -- to the effect that some non-vertically integrated program vendors may be offering exclusivity to some cable operators -- provide scant basis for a dramatic expansion of Commission regulation over the program supply business. This is especially so since the Commission has expressly found that such exclusive arrangements can have a *pro*-competitive effect by fostering the growth of new program services.[11]

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[10] Apparently attempting to show a change in circumstances since the Commission's very recent rejection of their position, several of these parties make much of a few instances in which non-vertically integrated program vendors have made investments in, or entered joint ventures with, cable MSOs. See, Bell Atlantic/NYNEX Comments at 3-5; Bell South Comments at 13; Comments of Wireless Cable Association at 4-10. The short answer to this argument for expansion of the program access provisions is that the Commission's attribution rules -- which are currently stricter in the program access context than with respect to the Commission's broadcast ownership rules -- will ensure application of the program access regime to program vendors having significant ties to cable operators. See, 47 C.F.R. § 76.1000(b).

[11] We note in this connection the statement by Ameritech New Media, Inc. ("Ameritech") that CBS Eye On People will not be available to terrestrial services -- such as telephone and wireless distributors -- that compete with cable operators. Ameritech Comments at 17. Curiously, Ameritech makes no reference to a June 27, 1997 letter sent to it by CBS Cable (sometimes referred to simply as "CBS") in response to its request for clarification of CBS's distribution policy concerning Eye On People. In that letter, CBS made clear that distribution decisions would be made on an individual basis depending on an assessment of what would best serve the business interests of Eye On People in the particular market involved. CBS expressly invited Ameritech to submit market specific information as to any of its systems on which it was interested in carrying Eye On People, an invitation to which Ameritech has not responded. CBS's willingness to consider carriage requests by Ameritech was

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As shown above, Congress did not intend the program access rules to apply to non-vertically integrated vendors, as opposed to program services affiliated with a cable operator. The policy basis underlying this distinction is clear. Although programmers in which cable operators have an attributable ownership interest may be motivated to deny competing technologies access to their programming as a means of stifling competition in the multichannel distribution market, non-vertically integrated program services have no such anti-competitive motive. Rather, their natural incentive is to secure the widest possible distribution of their products by any means available. Regulation of their business arrangements with MVPDs is therefore unnecessary.

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[11](...continued)
recently reaffirmed by CBS Senior Vice President Martin Franks. See, Electronic Media, "Cable Rivals Seek Better Program Access," August 4, 1997 at 3, 28.

In a similar vein, the Small Cable Business Association ("SCBA") complains yet again of CBS Cable's decision not to distribute TNN, CMT and Eye on People through the National Cable Television Cooperative, Inc. ("NCTC"). SCBA Comments at 14. As CBS has previously made clear, its business decision in this regard is based on a number of considerations, including the facts that NCTC does not offer full liability or joint and several member liability for its members' subscriber fees; that the alleged administrative advantages of dealing with a cooperative such as NCTC do not benefit CBS Cable which has the capacity to deal with thousands of accounts in the ordinary course of business; and that most NCTC members already have contracts for the services distributed by CBS Cable which they wish to carry. See, Letter dated August 18, 1993 from Donald H. Mitzner, President, CBS Cable, to Mark L. Pandzik, President, National Cable Television Cooperative, Inc. All of these grounds -- among others -- for CBS's decision to deal directly with NCTC's members, rather than through NCTC, are entirely legitimate.

It is true that unaffiliated multichannel program vendors may sometimes find exclusive arrangements with cable systems to be to their advantage. In an environment where channel scarcity is an increasingly significant barrier to the launch of additional cable networks, exclusivity can provide cable operators with a critical incentive to carry a new program service, and to devote resources to promoting it.[12] This, of course, is a reason to allow such exclusive arrangements, not to prohibit them.

Denying non-vertically integrated program vendors the discretion to reach exclusive agreements with cable operators would have a particularly negative effect on the ability of program services such as CBS Eye On People -- which cannot rely on affiliated cable systems for initial distribution -- to secure the minimal subscriber penetration which is critical to the launch of a new service. Extending the reach of the program access rules would therefore have the effect of impeding, rather than promoting, competition in the video programming marketplace.[13]

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12 The Commission has expressly recognized the potential pro-competitive benefits of exclusivity. See, In re Cablevision Industries Corporation and Sci-Fi Channel, 10 FCC Rcd 9786, 9790 (1995). See also In re News Channel, 10 FCC Rcd 691, 695 (1994) ("Exclusivity may promote diversity by providing incentives for cable operators to promote and carry a new and untested programming service.").

13 Allowing non-cable affiliated programmers to file petitions seeking approval of particular exclusive distribution arrangements would not ameliorate the negative impact of an extension of the rules. In addition to greatly increasing the legal costs associated with the launch of a new service, the delays attendant to securing advance Commission approval of such provisions would force unaffiliated programmers either to forgo offers of exclusivity, or to accept

(continued...)

3. There Is No Basis For Denying Broadcasters The Right To Bargain For Carriage Of A Second Channel In Retransmission Consent Negotiations.

In an argument which can only be characterized as startling, several parties contend that, because some broadcast stations have succeeded in securing carriage of a second channel by cable operators in exchange for retransmission consent, broadcast stations should be prohibited from reaching such agreements with *any* MVPD, in order to protect non-cable distributors from second channel demands motivated by the desire to provide back-door exclusivity to cable MSOs.[14] This argument is not only speculative in the extreme, but betrays a fundamental lack of understanding of the history of retransmission consent negotiations between broadcasters and cable systems.

As the most cursory reading of the contemporaneous trade press will indicate, during the first round of retransmission consent negotiations in 1993, MSOs were adamant in their refusal even to consider cash payments in return for retransmission consent rights. Negotiating carriage of a second channel thus became one of the only means available to broadcasters to secure some consideration from cable operators for the grant of retransmission consent. On the basis of some broadcasters' success in winning this concession from cable MSOs, and the conjectured threat of broadcasters' demanding similar arrangements with non-

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[13](...continued)
significant -- and possibly fatal -- delays in the roll out of their services.

[14] See, Bell South Comments at 14, 16; Comments of Wireless Cable Association at 11-14.

cable MVPDs for anti-competitive purposes, certain parties argue that broadcasters should be entirely denied an essential bargaining chip in retransmission consent negotiations with all multichannel distributors, cable and non-cable alike.

This argument constitutes a singular example of overreaching. It is not deserving of serious consideration by the Commission.

CONCLUSION

For all the reasons set forth above, the Commission should once again firmly reject the unwarranted expansion of the program access rules to non-vertically integrated cable programming vendors. Should individual instances be documented of the anti-competitive denial of programming by non-vertically integrated distributors to MVPDs using distribution technologies other than cable -- and none have been to this point -- such abuses may be adequately dealt with by the antitrust laws.

Respectfully submitted,

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